IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 10, 2006 Session

DIANE DOWNS, INDIVIDUALLY AND AS NATURAL PARENT OF RYAN CODY DOWNS v. MARK BUSH, ET AL.

Appeal from the Circuit Court for Davidson County
No. 04C470 Barbara N. Haynes, Judge

No. M2005-01498-COA-R3-CV - Filed on August 31, 2007

The mother of a deceased eighteen-year-old filed this wrongful death action against four defendants with whom her son had been partying prior to his death. Following the party and during the drive on Interstate 65 back to the deceased's apartment, the deceased, who had been riding in the bed of the pickup truck because he was intoxicated and nauseous, fell out or jumped out of the bed of the truck. Thereafter, the deceased was seen standing near but off of the roadway, at which time he ran into traffic, was struck by two vehicles traveling north on Interstate 65, and later died from the trauma. Following discovery, each defendant filed a motion for summary judgment contending, *inter alia*, he owed no duty to the deceased, he did not breach a duty, and the deceased's injuries and death were the result of the deceased intentionally running into traffic. The trial court granted summary judgment without stating its grounds. This appeal followed. Finding each defendant is entitled to summary dismissal as a matter of law, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Charles P. Yezbak, III, Nashville, Tennessee, for the appellant, Diane Downs.

C. Benton Patton, Nashville, Tennessee, for the appellee, Mark Bush.

Barry L. Howard and Melissa Bradford Muller, Nashville, Tennessee, for the appellee, Scott Hurdle.

W. Bryan Brooks, Nashville, Tennessee, for the appellee, Ryan F. Britt.

R. Kreis White, Brentwood, Tennessee, for the appellee, Jerry Dane Eller.

OPINION

Cody Downs, an eighteen-year-old who was intoxicated at the time of the accident, died following injuries he sustained when he was run over by two vehicles that were traveling on Interstate 65. It is undisputed that Downs ran onto the interstate in front of oncoming vehicles and was run over by two vehicles. What is disputed is whether the defendants, four men with whom he had been partying shortly prior to his death, owed or breached a duty owed to Downs and, if so, whether their breach was the cause in fact and legal cause of Downs' death.

The mother of Cody Downs (Plaintiff) filed this action against the four men with whom her son had been partying on the evening of his death. She presents two general claims against each defendant. One is a claim of negligence; the other is characterized by Plaintiff as a claim for outrageous conduct.

In her claim of negligence, Plaintiff contends the four defendants violated a duty of care by putting her son, who was intoxicated and nauseous, into the open bed of a pickup truck on a cold, damp evening, and then driving 60 to 70 miles per hour on the interstate. The relevant facts leading up to the tragic event are as follows. The deceased resided in an apartment with his longtime friend Ryan Britt on Glastonbury Drive in Nashville, Tennessee. At approximately 7:00 p.m. on the evening of February 15, 2003, Downs and Britt were joined by Scott Hurdle, Jerry Eller and Mark Bush at their apartment for an evening of social activities for which there was little planning.[1] One of them suggested they go to a party at an apartment in the Cool Springs area near Franklin, Tennessee, which was several miles south of the deceased's apartment. They agreed and all of them rode in the cab of the pickup truck to Cool Springs. The truck was owned by Hurdle; however, he did not drive. Instead, Eller agreed to be the designated driver for the evening.

Downs became intoxicated, obnoxious and belligerent not long after they arrived at the apartment in Cool Springs, and as a consequence, the host insisted that Downs leave.[2] Shortly thereafter, Downs agreed to leave, and the four defendants left with him. After a brief discussion in the parking lot, the five men agreed to return to Downs' apartment where their evening had begun. Thus, all five men got into the cab of the truck, and, as before, Eller was the driver. Hurdle, who owned the truck, sat in the front passenger's seat. The other three, Downs, Britt and Bush, rode in the back seat in the cab of the truck.

While they were traveling north on Interstate 65 to return to Downs' apartment in Nashville, Downs became nauseous, at which time they stopped along the interstate so he could get out of the truck to regurgitate. What occurred while the truck was stopped along Interstate 65 is in dispute; however, it is undisputed that Downs and Britt, if not others, got out of the truck at which time Downs

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[1]There was a sixth man who joined them at the beginning of the evening, but he left the group when they arrived at the "party" in Cool Springs. He had no involvement in the matters at issue.

[2]The record indicates the deceased was rowdy and broke some property at the party.

regurgitated. After a brief respite, those who had gotten out of the truck returned to the vehicle, and all five of them proceeded north on Interstate 65; however, Downs did not get into the cab of the truck. Instead, he rode alone in the open bed of the truck while the defendants rode in the cab. Whether Downs got into the bed of the truck on his own or whether one or more of the defendants assisted him or "put" him in the bed of the truck is disputed.

Once all five of them were in the truck, with Downs riding in the bed of the truck, they continued north on Interstate 65. Shortly thereafter, Downs beat on the rear window of the cab, in response to which Eller, the driver, slowed down in order to pull the truck onto the shoulder of the interstate and stop; however, as he was preparing to stop, Downs stopped beating on the rear window, and someone in the cab advised Eller to keep driving because Downs was sitting or lying down in the bed of the truck. As instructed, Eller continued driving to the apartment.[3]

It was not until several interstate miles and minutes had passed that Eller, Hurdle, Britt or Bush realized that Downs was no longer in the bed of the truck. Although none of the defendants knew when, where or how Downs exited the vehicle, they realized he was no longer in the bed of the truck and they had no idea where he was. They did not go look for him; instead, they continued on to the apartment. It was not until much later that they learned of the events that follow.

No one knows what occurred after the four men last saw Downs in the bed of the truck until he was observed on the shoulder of the interstate by Melissa Barrell. She was a passenger in the front seat of a vehicle being driven by her husband. They were traveling north on Interstate 65. As Ms. Barrell described it, when she first saw Downs, he was standing on the shoulder of the interstate, a short distance ahead of her vehicle, in a position similar to that of a runner. A moment later, she saw him run onto the interstate immediately in front of her vehicle. With no time to react or to avoid Downs, the Barrell vehicle struck Downs, as did the next vehicle. Both vehicles stopped and called for emergency assistance. Downs was transported by ambulance to a hospital where he was subsequently pronounced dead as a result of multiple trauma.

In the Complaint that followed, Plaintiff contends that all four defendants were negligent by putting her son unrestrained in the open bed of the pickup truck, when he was very drunk, while they traveled along an interstate highway at speeds up to 70 miles per hour, which posed a substantial risk or serious injury or death. She also contends that Britt, with whom her son shared an apartment, owed her son a special duty based upon their close personal relationship. As for Eller and Hurdle, she contends Eller owed a special duty as the driver of the truck, and Hurdle owed a special duty because he owned the truck. Plaintiff also contends the four defendants' actions constituted "outrage."

Each defendant filed a separate Answer to the Complaint. All defendants denied owing or violating a duty to Downs and contended his injuries and death were the result of his own conduct, which was the cause in fact and legal cause of his injuries and death. Some of the defendants characterized his action, that of running from the side of the road into traffic, as an independent

[3]Whether the vehicle actually stopped for a brief moment or merely slowed down but did not stop is in dispute.

intervening act, for which the defendants are relieved of liability as a matter of law.

Following discovery, each defendant filed a motion for summary judgment seeking dismissal of the claims.[4] Ryan Britt, the deceased's close friend and apartment mate, contended he owed no special duty. Instead, he was just a friend who shared an apartment, nothing more. Britt also contended Plaintiff had failed to establish either cause in fact or legal cause, and Downs' injuries and death were the result of his own action of intentionally running onto the interstate in front of the Barrell vehicle. Britt also contended it was not foreseeable that the deceased would choose to run onto the interstate in front of a vehicle.

Scott Hurdle, the owner of the truck, had no prior relationship with the deceased, having met Downs the day before his death. Hurdle contended he owed no duty and breached no duty. The only basis on which he could be liable was as the owner of the vehicle; however, the undisputed facts show that the deceased was not injured by the operation of Hurdle's vehicle but instead by Downs' intentional act of running onto the interstate in front of traffic, which was unforseeable.

Jerry Eller, the designated driver, contended he breached no duty and that there was no evidence to indicate that his operation of the vehicle was a contributing factor to Downs' injuries or death. Eller also contended Downs' injuries and death were the result of his act of running onto the interstate in front of traffic.

Mark Bush contended he was merely a passenger, along for the ride and the party, and that he owed no duty and breached no duty. Further, Bush contended Downs' action was an independent intervening cause of his death.

Although each defendant's motion and basis for summary dismissal was worded differently, each contended that Downs' negligent and intentional acts were the sole cause in fact and legal cause of his injuries and death. They generally contended Downs' negligence was extensive in scope, variety and duration; that he voluntarily consumed alcohol to excess, engaged in a pattern of conduct while in the cab of the truck that was a distraction to the driver; and that he later intentionally ran from a position of safety, from the shoulder of interstate, directly into traffic.

The trial court granted each defendant's motion for summary dismissal without giving an explanation for its reasoning or the grounds upon which summary judgment was granted.[5] This appeal followed.

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[4]Other defendants named as parties to this action also filed motions for summary judgment. The claims as to those defendants were also dismissed; however, Plaintiff did not appeal the dismissal of the claims against the former defendants.

[5]When the trial court granted summary judgment in this matter, Tenn. R. Civ. P. 56.04 did not expressly require that grounds be stated for granting a motion for summary judgment unless a party made a request. Effective July 1, 2007, the rule was amended. The rule now provides: "The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling." Tenn. R. Civ. P. 56.04 (2007).

Plaintiff appeals contending material facts are in dispute for which summary judgment was inappropriate.

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Stovall v. Clarke*, 113 S.W.3d 715, 721 (Tenn. 2003); *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall*, 113 S.W.3d 721. Moreover, it is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

For there to be a viable cause of action for negligence, the plaintiff must establish the following elements as to each defendant: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) legal cause – formerly known as proximate cause. *McCall*

v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995); *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993); *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991). The existence of the first element, duty, is a question of law. *Draper v. Westerfield*, 181 S.W.3d 283, 291 (Tenn. 1995).

The right to recover for injuries resulting from another's negligence is based in part upon the violation of a duty. *Chattanooga Warehouse & Cold Storage Co. v. Anderson*, 141 Tenn. 288, 296, 210 S.W. 153, 155 (1919). If no duty exists, there can be no negligence. *Id*. Thus, establishment of a duty owed by a defendant is an essential element, a prerequisite to any recovery under a theory of negligence. *Church v. Perales*, 39 S.W.3d 149, 163 (Tenn. Ct. App. 2000); *Bradshaw*, 854 S.W. 2d at 869.

Although all persons have a "general duty" to use reasonable care to refrain from conduct that will foreseeably cause injury to others, *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005) (citing *Turner v. Jordan*, 957 S.W.2d 815, 818 (Tenn. 1997); *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992)), the critical question in many negligence cases is whether the defendant owed a duty to the plaintiff. *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998). Whether there is a duty owed by one person to another particular person is a question of law to be decided by the court. *Dooley v. Everett*, 805 S.W.2d 380, 384 (Tenn. Ct. App. 1990). In deciding the issue of duty, courts look at whether a particular defendant was under any obligation imposed by law for the benefit of a particular plaintiff and that determination is a question of law to be decided by the court. *Id., Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn.1998).

DUTY

Plaintiff contends defendants Scott Hurdle and Jerry Dane Eller, in their respective capacities as the driver and owner of the vehicle, owed Cody Downs the duty to assure that the truck was operated in a lawful and non-negligent matter. As for Ryan Britt, Plaintiff contends that he, as the best friend of Cody Downs, voluntarily undertook the role of caretaker, and as a result, he owed Downs a special duty to protect him from harm. Plaintiff also asserts, as is evident from the Complaint, affidavits, depositions and briefs that all four of the defendants owed Cody Downs due to a number of factors Plaintiff contends were significant: the three most significant of which are that Downs was intoxicated, he should not have been in the open bed of a pickup truck, and the defendants assumed the affirmative duty to get him home safely. We analyze the various issues below.

DOWNS' AGE AND INTOXICATION

Plaintiff places great emphasis on her contention that Cody Downs was intoxicated. We have determined that Plaintiff's reliance on Downs' voluntary intoxication is misplaced.

It is recognized in a number of jurisdictions that a person's intoxication "to such an extent that he or she is unable to take proper care of himself or herself does not impose on others an affirmative

duty to provide for his or her safety."[6] 65 C.J.S. Negligence §84; *see Forrest v. Gilley*, 570 N.E.2d 934, 937 (Ind. App. 1 Dist. 1991). Tennessee courts have repeatedly held that an adult's voluntary intoxication does not relieve that person of the consequences of his own negligence.[7] *See Kirksey v. Overton Pub, Inc*. 739 S.W.2d 230, 235 (Tenn. Ct. App. 1987) (citing *Highland Dodge, Inc. v. Trent*, 445 S.W.2d 903 (Tenn. 1969), *Schwartz v. Johnson*, 280 S.W. 32 (Tenn. 1925)). Moreover, this Court noted in 2004 that an intoxicated person's conduct "must be measured against the conduct of an ordinary, reasonable person rather than an ordinary and reasonable intoxicated person." *Morgan v. State*, No. M2002-02496-COA-R3-CV, 2004 WL 170352, at *8 (Tenn. Ct. App. Jan. 27, 2004) (citing *Louisville & Nashville R.R. v. Hall*, 5 Tenn. Civ. App. 491, 502 (1915)).

It should also be acknowledged that Cody Downs was eighteen years old and, with certain exceptions, a person eighteen years of age has the same responsibilities as one who is twenty-one years of age. *See* Tenn. Code Ann. § 1-3-113; *see also Nichols v. Atnip*, 844 S.W.2d 655, 659 (Tenn. Ct. App. 1992) (holding the statute "completely emancipated" eighteen-year-olds from the control of their parents). Although Tennessee Code Annotated, Section 1-3-113 provides that persons under the age of twenty-one, such as Cody Downs, do not have the same right to purchase or consume alcohol, the General Assembly did not alleviate the "duties" and "responsibilities" associated with consuming alcohol with regard to persons between the ages of eighteen and twenty-one. Furthermore, our courts have recognized that "underage purchasers of alcoholic beverages should bear the brunt of their own actions if they are familiar with the use of alcohol and with its effect on a person's judgment and conduct." *Rollins v. Winn Dixie*, 780 S.W.2d 765, 768 (Tenn. Ct. App. 1989). It is undisputed that Cody Downs was very familiar with alcohol and its effects. Accordingly, he is to be held to the standard of care of an ordinary, reasonable and sober adult. Therefore, Cody Downs' voluntary intoxication does not impose a special duty of care on the defendants.

RIDING IN THE OPEN BED OF A TRUCK

Plaintiff additionally places great emphasis on the fact Cody Downs was riding in the open bed of the truck. Specifically, Plaintiff contends "there is a substantial risk of serious injury or death from riding unrestrained in the open bed of a pickup truck. Likewise, . . . this risk is common sense and well known to the motoring public." Plaintiff, however, has provided no competent evidence to support these contentions and has failed to cite any authority which states that it is unlawful or negligent for an adult to ride in the open bed of a truck on a street, road or highway of this state.

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[6] 65 C.J.S. Negligence §84 cites to *Cunningham v. Ayer & Lord Tie*, 118 S.W. 948, 949-51 (Ky. App. 1909). The court in this case takes into account the level of intoxication of the deceased plaintiff when assigning duty; however, the legal basis upon which the court takes into account the level of intoxication of the plaintiff is firmly planted in the law regarding common carriers, which are held to a higher standard of care. Thus, we are aware of the facts and applicable law of which serves as the basis for the cited C.J.S. section; however, the countervailing underlying authority is distinguishable in numerous respects.

[7] The Tennessee Pattern Jury Instructions (Civil) state that a person is intoxicated when that person's physical and mental abilities are impaired as a result of drinking an alcoholic beverage. T.P.I. - Civil 4.10. The impairment must be to the extent that the person is unable to act with ordinary or reasonable care, as would a sober person under the same or similar circumstances. *Id.*

The Tennessee General Assembly has identified many activities pertaining to the operation of a motor vehicle which pose a substantial risk of serious injury or death. Some of them are set forth in Tenn. Code Ann. § 55-8-101 *et seq*., which are identified as the "Rules of the Road." The "Rules of the Road" mandate that drivers obey traffic-control devices, Tenn. Code Ann. § 55-8-109; not follow another vehicle too closely, Tenn. Code Ann. § 55-8-124; and not exceed the posted speed limits. Tenn. Code Ann. § 55-8-152. The Rules of the Road also declare it unlawful to cling to vehicles while riding upon a bicycle, roller skates, sled or toy vehicle. Tenn. Code Ann. § 55-8-174. There are other proscribed activities set forth in other sections of the Tennessee Code, such as the prohibition against operating a vehicle under the influence of alcohol or drug. *See* Tenn. Code Ann. § 55-10-401. There is, however, no statutory or common law prohibition against an adult riding in the open bed of a pickup truck.

Whether anyone should ride in the open bed of a pickup truck has been the subject of debate before the Tennessee General Assembly in recent years. The only statutory prohibition, however, against riding in the open bed of a pickup truck pertains to children under twelve years of age. *See* Tenn. Code Ann. § 55-8-189. Accordingly, for reasons the General Assembly believed sound, there is no prohibition against an eighteen year-old adult or for that matter a twelve year-old child, riding in the open bed of a pickup truck in Tennessee.

Accordingly, as a matter of law, we place no significance on the fact Cody Downs was riding in the open bed of the truck on the evening in question.

UNDERTAKING A SPECIAL DUTY OF CARE

Plaintiff alleges that the defendants assumed a duty by voluntarily undertaking "the task of caretaker for Cody." Therefore, Plaintiff contends, each of them owed Cody Downs "a duty to use reasonable care to ensure his safe return to his apartment." This is based on the fact the five men, Downs, Britt, Hurdle, Eller and Bush, set out together for an evening of fun, and when Downs became intoxicated and disruptive – for which he was instructed to leave the party in Cool Springs – the defendants allegedly assumed a duty when they all agreed to go back to his apartment. Furthermore, Plaintiff contends that the defendants also assumed a duty by assisting or "putting" the intoxicated Downs into the bed of the truck after having stopped when he became nauseous.[8] We have determined that none of the defendants assumed such a duty because Downs was not helpless to adequately care for himself, and none of them took charge of him or the situation.

Generally, a person is not under a duty to take affirmative action for the protection of another. *Biscan*, 160 S.W.3d at 478-79. While a person has a general duty to not engage in conduct that creates an unreasonable, foreseeable risk to others, with the exception of special relationships that

[8]Whether Downs got into the truck under his own power or whether one or more of the defendants helped to put him in the bed of the truck is in dispute. The record contains evidence that Downs got into the open bed of the truck under his own power, and there is evidence that one or more Defendants helped him into the bed of the truck. For purposes of summary judgment, we view the facts in the light most favorable to the party opposing the motion. Since Plaintiff opposed the motions at issue, we assume that all Defendants helped "put" Downs into the bed of the truck.

may constitute the basis for an affirmative duty, there is no affirmative duty to prevent another from sustaining harm. *Bradshaw*, 854 S.W.2d at 871(citing Harper & Kime*, The Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 887 (1934)). A special duty, however, may arise when "the defendant stands in some special relationship to either the person who is the source of the danger, or to the person who is foreseeably at risk from the danger." *Turner*, 957 S.W.2d at 818 (citing *Bradshaw*, 854 S.W.2d at 871).

In determining whether a special relationship exists, Tennessee courts will weigh the public policy considerations, which "are crucial in determining whether a duty of care existed in a particular case." *Burroughs v. Magee*, 118 S.W.3d 323, 329 (Tenn. 2003) (citations omitted). Relationships that give rise to a special duty include that of innkeeper and guest, a common carrier and its passenger, and certain persons having custody over others. *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 895 (Tenn. 1996); *Nichols*, 844 S.W.2d at 662; RESTATEMENT (SECOND) OF TORTS § 314A. The Tennessee Pattern Jury Instructions identify the following as special relationships that may give rise to a duty: (1) common carriers, (2) innkeepers, (3) possessors of property open to the public, and (4) social hosts. T.P.I. - Civil 4.31. None of the foregoing "special relationships" apply to this case.

One who acts for the welfare of another, even though gratuitously, may become subject to the duty of acting carefully. *Marr v. Montgomery Elevator Co.*, 922 S.W.2d 526, 529 (Tenn. Ct. App. 1995). If someone attempts to aid another, *and in doing so takes charge and control of the situation*, that person may be regarded as having entered voluntarily into a relation which is attended with responsibility. *Lindsey v. Miami Development Corp*., 689 S.W.2d 856, 860 (Tenn. 1985) (emphasis added). In such event, that person may then be liable for a failure to use reasonable care for the protection of the person he or she aided. *Id*. The criteria relevant to the facts of this case are found in RESTATEMENT (SECOND) OF TORTS § 324 (1965), which reads:

> *One who . . . takes charge of another who is helpless adequately to aid or protect himself* is subject to liability to the other for any bodily harm caused to him by
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> > (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
> >
> > (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

RESTATEMENT (SECOND) OF TORTS § 324 (1965) (emphasis added).

Although the focus of many opinions is whether the defendant had "taken charge," the Restatement tells us there is another factor to be considered. That is whether the person who is being aided is helpless to adequately aid or protect himself. The significance of this factor is evident from the fact it is emphasized in committee comments to Section 324. In comment (a.) the committee

states that one of the particular features of the rule is that the plaintiff "is in a helpless position." In comment (b.) the committee states the rule is "applicable" whenever one takes charge of another "*who is incapable of taking adequate care of himself*." *Id*. at p. 140. (emphasis added).

It is undisputed that Downs was voluntarily intoxicated, a circumstance that had occurred on several previous occasions. There is also evidence that he was also obnoxious, belligerent and nauseous. There is not, however, evidence that he was helpless to adequately care for himself. To the contrary, it is undisputed that he walked in the apartment in Cool Springs under his own control, and after being there for a short while[9] he left the apartment under his own control. Moreover, when he became nauseous in the truck[10] on the ride back to his apartment, he got out of the vehicle under his own control, and stood on the shoulder of the road to relieve his nausea for up to five minutes[11] while the others waited. When Downs and the others were getting back in the cab of the truck, which Downs was doing under his own power, Downs once again became nauseous.[12] It was at this time that someone suggested he ride in the open bed of the truck so that he would not vomit in the truck or on one of the defendants. This recommendation was immediately followed by another defendant who said that was a good idea because his friends would often ride in the bed of the truck when they were nauseous. After a very brief conversation, and without any objection or resistance by Downs, Downs got into the bed of the truck, whereupon the five of them proceeded north on Interstate 65 headed to Downs' apartment.

We find no cases on point in Tennessee; however, we have identified two cases from Connecticut which provide an enlightening contrast by which to appreciate the concept of helplessness as envisioned by Section 324 of the Restatement. They are *Coville v. Liberty Mutual Ins. Co.*, 57 Conn. App. 275, 748 A.2d 875, cert. granted, 253 Conn. 919, 755 A.2d 213 (2000)[13] and *Marek v. Going*, 66 Conn. App. 557, 561, 785 A.2d 248, 251 (Conn. App. 2001). In *Marek*, the plaintiff argued on appeal that she was a "helpless" person due to her intoxication. To emphasize that point, the plaintiff attempted to draw a comparison of her circumstances to the plaintiff in *Coville*. This comparison proved to be most unwise, as the *Marek* court explained in the opinion.

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[9]The length of time they were at the party is not certain. One witness said they were only there for ten to fifteen minutes. Another witness said it was thirty to forty minutes. Still another said it was less than an hour.

[10]He did not vomit in the truck, he had the "dry-heaves."

[11]He was bent over a portion of the time regurgitating.

[12]Some of the defendants said Downs again experienced the dry-heaves as he stepped into the back seat of the truck.

[13]Certiorari was granted with the issue limited to whether "the Appellate Court properly concluded that the trial court's instructions to the jury, taken as a whole, failed to fairly and adequately present the case to the jury where the trial court did not specifically charge in accordance with the 4 Restatement (Second), Torts §§ 314A and 324 (1965), as requested by the plaintiff." *See Coville v. Liberty Mutual Ins. Co.*, 253 Conn. 919, 755 A.2d 213 (2000). The appeal to the Supreme Court was withdrawn prior to a decision from that court. *Id.*

> There is a vast difference between the condition of the plaintiff in *Coville* and the plaintiff's condition in this case. In *Coville*, the plaintiff had consumed alcohol to the point of being semiconscious and completely unable to care for herself. *Id.*, at 277, 748 A.2d 875. At a hospital emergency room, the *Coville* plaintiff was found to have a blood alcohol content of 0.38 percent.

Marek, 785 A.2d at 251 (internal footnotes omitted). The *Marek* court went on to state, "although there was evidence that the plaintiff had consumed alcohol, there was no evidence that she was *semiconscious or in any other way helpless*." *Id.* (emphasis added). Although it is undisputed that Cody Downs was intoxicated, there is no evidence upon which to base a finding that he was intoxicated to the degree to render himself helpless. To the contrary, the record tells us he left the party in Cool Springs under his own control, and when he became nauseous in the truck on the ride back to his apartment, he got out of the vehicle and stood on the shoulder of the road under his own control. Based upon these facts, we find no basis to conclude that Cody Downs was helpless, as that term applies to Section 324 of the Restatement.

As for the contention that the defendants took control of Downs as he got into the bed of the truck, the record provides inconsistent scenarios concerning how Downs got into the bed of the truck. One of the defendants stated that Downs got into the truck, another said "we helped him into the back of the truck," and yet another testified that Britt and perhaps another defendant helped "put" Downs in the bed of the truck.

An eerily similar factual scenario was the subject of a duty analysis by the South Carolina Supreme Court in the matter of *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). In *Carson*, the plaintiff and defendant, who were good friends, worked together in a landscaping business, and they often socialized together. On the day of the accident, they decided to go fishing immediately after they finished work around 1:00 p.m. The defendant drove. They bought beer and fished for three hours. Thereafter, they picked up a friend, Willie Brock, and the three of them went to a marina, watched the boats, played pool, and drank more beer. Afterwards, Brock and the defendant purchased liquor, and the plaintiff purchased even more beer.

Later on, the three men drove to a pool hall. Brock and the defendant went inside while the plaintiff remained in the car drinking beer. After a while, the plaintiff advised them that he wanted more beer, whereupon the defendant bought him two beers even though he realized the plaintiff was "drinking pretty good." After they left the pool hall, they proceeded to Brock's house, at which time the plaintiff became angry because the others would not get him any more beer. Once at Brock's house, Brock and the defendant tried to get the plaintiff to move into the front seat of the car, but he refused because he was angry about not having any more beer. Brock remained at home while the defendant drove off with the plaintiff still in the back seat. Shortly thereafter, the plaintiff decided he wanted to sit in the front. When the defendant told him to wait, the plaintiff tried to climb into the front seat, knocking the gear-shift into neutral. Once the defendant realized he could not control the plaintiff, he pulled over onto the shoulder of the road, whereupon both men got out of the car. After a brief respite, the defendant was unable to get the plaintiff back into the car, so he decided to briefly

drive away to allow the plaintiff to "cool off." After driving approximately a mile or two, he returned; however, in the interim, the plaintiff had attempted to cross the highway and was struck by a truck. Suit followed.

The plaintiff contended the defendant had "taken charge of" him and, thereby, had assumed a duty to leave the plaintiff in no worse a position than when he took charge of him. *Id.* at 5. He contended the defendant "took charge" when the two men left work to go fishing. He also contended the defendant "took charge" when he did not leave the plaintiff at Brock's home. *Id.* The trial court, however, concluded that the defendant did not owe the plaintiff a duty, and directed a verdict for the defense. The issue on appeal was whether the defendant owed a duty of care to the plaintiff because he took charge of him.

The evidence was disputed concerning whether the defendant had "forced" the plaintiff out of the car, but it was admitted that the defendant told the police he had "discharged" or "put [the plaintiff] out" of his vehicle. *Id.* at 5. It was undisputed the accident occurred at midnight; it was dark, misting rain, there were no lights on the highway, and the plaintiff was wearing dark clothing. *Id.* The shoulder of the highway was extremely wide and there was ample room for a pedestrian to walk on the shoulder or the highway. *Id.*

Like the case at bar, the duty issue in *Carson* hinged on the Restatement of Torts 2d, Section 324 and whether the defendant took charge of a helpless person. The South Carolina court held that for one to assume a legal duty of care by taking charge of a helpless person, the plaintiff must establish that the defendant did more than act. *Id*. at 6. The plaintiff must additionally establish that the defendant "through affirmative action assumed an obligation or intended to render services for the benefit of another." *Id*. (quoting *McGee By & Through McGee v. Chalfant*, 248 Kan. 434, 806 P.2d 980, 983 (1991)); *see also Ocotillo West Joint Venture v. Superior Court*, 173 Ariz. 486, 844 P.2d 653 (App. 1992) (golfer assumed duty by telling golf course employees who had taken the intoxicated golfer's car keys he would drive the intoxicated golfer home.) Applying the foregoing principle to the facts, viewed in the light most favorable to the plaintiff, the South Carolina Supreme Court found the facts did not indicate that the defendant, "through affirmative action, assumed an obligation or intended to render services for [the plaintiff]'s benefit." *Id*. It was on that basis the court concluded the defendant owed no duty to the plaintiff and thus the trial court properly dismissed the case. *Id.*

The issue of whether the defendant had assumed a special duty by helping an obviously intoxicated friend and fraternity brother was the subject of the Iowa Supreme Court's analysis in *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 655 (Iowa 2000). In that matter, the estate of a deceased college student filed suit alleging, in pertinent part, that a friend and fraternity brother of the deceased had assumed the duty to take care of the deceased after the deceased fell down a flight of stairs due to his voluntary intoxication. After the intoxicated decedent (plaintiff) fell down a small flight of stairs, his fraternity brother (the defendant) helped him get up and then put the plaintiff on a spare couch in the defendant's room. The court described the defendant's action as similar to helping "an injured player from the field." *Garofalo*, 616 N.W.2d at 651. The plaintiff soon passed out. The defendant remained with him for approximately thirty minutes, then left, and

returned hours later to find the plaintiff still asleep on the couch. The defendant adjusted the plaintiff's pillow and went to sleep himself. A few hours later, the defendant awoke, the plaintiff appeared to be sleeping, and the defendant left to attend class. When he returned, it was discovered that the plaintiff was dead as a result of his alcohol consumption.

The estate filed suit alleging the defendant assumed a duty by "taking charge to aid" the plaintiff, and he breached that duty by failing to monitor and check on him thereafter. After analyzing the facts, the Iowa Court concluded that the defendant's actions of assisting the plaintiff did not rise to the level of "taking charge." Therefore, the court held the defendant owed no duty to the deceased. *Garofalo*, 616 N.W.2d at 655-56.

We therefore conclude that Downs was not helpless and that none of the defendants "took charge or control" of Downs or his situation. Accordingly, none of the defendants owed a special duty to care for or protect Cody Downs.

DUTY OWED BY THE DRIVER OF THE TRUCK

As the driver of the truck, Jerry Eller owed Cody Downs and all occupants of the vehicle the duty "to maintain a reasonably safe rate of speed; to keep the vehicle under reasonable control; to keep a proper lookout under the existing circumstances; to see and be aware of what is in that driver's view; to use reasonable care to avoid an accident." T.P.I. - Civil 5.01; *See Whitaker v. Harmon*, 879 S.W.2d 865, 869 (Tenn. Ct. App. 1994); *Ludwick v. Doe*, 914 S.W.2d 522, 524 (Tenn. Ct. App. 1995).

Plaintiff alleges in the Complaint that Eller drove the vehicle in a negligent manner, stating:

> Defendant [Eller] breached [his] duty owed to plaintiff to maintain a reasonably safe rate of speed, to keep [his] vehicle under reasonable control, to keep a proper lookout under the existing circumstances, to see and be aware of what was in their view, to use reasonable care to avoid an accident and/or to obey all traffic laws and [was] thereby negligent.

Plaintiff further alleges Eller, as the designated driver, owed Cody Downs a special, heightened duty. Plaintiff, however, fails to cite to any relevant support for this legal proposition, and we find no authority in Tennessee to support the hypothesis that a designated driver owes a special or heightened duty of care to the occupants. For its only support, Plaintiff cites to *Morin v. Keddy*, No. CV 90 0701113, 1993 WL 451449, at *3 (Conn. Super. Oct. 25, 1993), an unpublished case from the Superior Court of Connecticut; however, the facts of the *Morin* case are readily distinguishable. Finding no authority to support Plaintiff's proposition, we therefore conclude that a so-called "designated driver" – meaning one who assumes the duty to remain sober for the purpose of driving others – owes no special duty to his or her passengers other than the duty to be a sober and safe driver.

It is undisputed that Eller fulfilled his commitment to remain sober. We therefore find no basis to conclude that Eller owed a special duty to take affirmative steps to protect Downs based on

the mere fact Eller agreed to be the "designated driver." Accordingly, we conclude that the duty Eller owed Downs was the duty owed by all drivers to the occupants of the vehicle. *See* T.P.I. - Civil 5.01; *Whitaker*, 879 S.W.2d at 869.

SCOTT HURDLE - THE OWNER OF THE TRUCK

Plaintiff contends that Scott Hurdle owed Cody Downs a duty by virtue of his ownership of the truck and his presence in the truck. Plaintiff cites to Tenn. Code Ann. § 55-10-311, which states an owner of a vehicle can be liable for a driver's *negligent* act when the driver operates the vehicle for the owner's use and benefit.

As Plaintiff correctly asserts, the General Assembly created a statutory presumption, prima facie evidence, of agency between the owner of a vehicle and the driver of that vehicle in order to impute a driver's negligence to the owner. Tenn. Code Ann. § 55-10-311(a); *see Godfrey v. Ruiz*, 90 S.W.3d 692, 696 (Tenn. Ct. App. 2001). Accordingly, we conclude that the duty Hurdle owed Downs was the duty owed by owners of a vehicle.

RYAN BRITT - THE BEST FRIEND

Plaintiff contends Ryan Britt owed Cody Downs a special, affirmative duty to protect him from harm due to the fact the two were best friends, they shared an apartment, and each had proclaimed a general intent to look out for and care for the other. Plaintiff, however, has failed to cite any authority to support the contention that a special, affirmative duty arises from such a relationship.

We find no authority to conclude that the relationship between Ryan Britt and Cody Downs, essentially that of best friends, constitutes a special relationship that gives rise to a special duty to protect. As we noted earlier, the recognized special relationships that may give rise to a special duty include those between an innkeeper and his guest, a common carrier and its passenger, certain persons having custody over others, possessors of property open to the public, and social hosts. *See McClung,* 937 S.W.2d at 895; *Nichols*, 844 S.W.2d at 662; RESTATEMENT (SECOND) OF TORTS § 314A; T.P.I. - Civil 4.31. Finding no factual basis or legal authority upon which to base a special duty or affirmative duty of care owned by Ryan Britt to Cody Downs, we conclude that Ryan Britt did not owe Cody Downs the special, affirmative duty alleged by Plaintiff.

MARK BUSH - THE OTHER PASSENGER IN THE TRUCK

Mark Bush was not the driver or the owner of the vehicle, and he had no special relationship with Cody Downs. The best way to summarize Bush's role that evening is to state that he was merely along for the ride, so-to-speak. Based upon the evidence in the record, we find no basis in law or in fact to conclude that Bush owed a duty to Downs.

BREACH OF A DUTY

We have determined that there is no basis in law or in fact to conclude that any of the defendants other than the driver (Eller) and owner (Hurdle) of the truck, owed a duty to Cody Downs. Therefore, only Eller and Hurdle could be found to have breached a duty of care owed to Downs. Hurdle's liability, if any, is vicarious through Eller.

Questions regarding breach of duty, causation in fact, and legal causation are ordinarily questions of fact for the jury; however, even these questions may be decided at the summary judgment stage "if the evidence is uncontroverted and if the facts and the inferences drawn reasonably from the facts permit reasonable persons to draw only one conclusion." *Rains v. Bend of the River Shooting Supplies*, 124 S.W.3d 580, 588 (Tenn. Ct. App. 2003) (citing *White v. Lawrence*, 975 S.W.2d 525, 529-30 (Tenn. 1998) (intervening cause); *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991) (proximate or legal cause); *Anderson v. City of Chattanooga*, 978 S.W.2d 105, 107 (Tenn. Ct. App. 1998) (causation and breach of duty)). We will, therefore, examine whether there are sufficient facts in the record to create a dispute of fact concerning whether Eller breached the duty of care owed by the driver of a vehicle to his passengers.

Jerry Eller, as the driver of the vehicle, owed Cody Downs and all other passengers the duty to operate the vehicle in a non-negligent manner, to maintain a reasonably safe speed; to keep the vehicle under reasonable control, to keep a proper lookout, to see and be aware of what is in his view, and to use reasonable care to avoid an accident. *See* T.P.I. 5-Civil 5.01; *see also Whitaker*, 879 S.W.2d at 869. Having examined the record closely, we find no evidence upon which to base a finding that Jerry Eller was speeding, swerving, inattentive, careless, or otherwise negligent in his operation of the vehicle. Finding no basis for a judge or jury to conclude that Eller breached his duty as the driver of the vehicle, we therefore conclude that summary dismissal of the claims against Jerry Eller was proper.

Scott Hurdle's liability, if any, is dependent upon a finding that Jerry Eller, the driver, violated a duty owed Cody Downs. *See* Tenn. Code Ann. § 55-10-311. We have determined that Eller did not breach a duty, and therefore, there is no basis upon which to find that Scott Hurdle breached a duty to Cody Downs. There being no basis for a judge or jury to conclude that Scott Hurdle breached a duty, we therefore conclude that summary dismissal of the claims against Scott Hurdle was proper.

LEGAL CAUSE - INTERVENING CAUSE

There is an additional basis upon which the trial court could have properly dismissed Plaintiff's negligence claims against each of the defendants. That is because the defendants negated the essential element of legal cause. Instead of the defendants' acts or omissions constituting the legal cause of the injuries to Cody Downs, we have determined, after viewing the facts in the light most favorable to Plaintiff, that the actions of Cody Downs after he was separated from Defendants was the legal cause of his injuries and death.

The relationship between separate acts which may or may not have contributed to an injury are part of the legal cause analysis. The intervening cause doctrine has been called a common-law liability shifting device. *Waste Mgmt. Inc. of Tenn. v. South Cent. Bell Tel. Co.*, 15 S.W.3d 425, 432 (Tenn. Ct. App. 1997). The doctrine of independent intervening cause is one of the rules of law that will relieve a negligent actor from liability. *Rains*, 124 S.W.3d at 593. An independent intervening cause breaks the chain of proximate causation and thereby precludes recovery. *White*, 975 S.W.2d at 529; *Waste Mgmt. Inc.*, 15 S.W.3d at 432. Simply stated, the doctrine provides that "a negligent actor will be relieved from liability when a new, independent and unforeseen cause intervenes to produce a result that could not have been foreseen." *Rains,* 124 S.W.3d 593.

The record is devoid of evidence to explain how or why Cody Downs was on the side of the interstate instead of being in the bed of the pickup truck. The last time he was seen by Defendants, he was sitting in the bed of the pickup truck. Then there is a gap in the evidence until he is seen standing on the shoulder of the interstate roadway. This is when and where he was first observed by Melissa Barrell, who was a passenger in the front seat of the vehicle driven by her husband. They were traveling north on Interstate 65.

When Ms. Barrell first saw Cody Downs, he was "crouched" as though he were in a "runners stance" on the shoulder of the interstate a short distance ahead of her vehicle. It was at this moment, as she first observed him, that for reasons unexplained by the record, Cody Downs ran onto the interstate immediately in front of her vehicle whereupon he was struck by the Barrell vehicle and the following vehicle.

The question presented is whether the foregoing actions by Cody Downs, those following his separation from Defendants, constitute an independent, intervening act which would relieve Defendants of liability had they breached a duty of care to Cody Downs. We start our analysis with the recognition that where two separate and distinct causes, unrelated in operation, contribute to an injury, but one of them merely furnishes the condition making the injury possible, a longstanding rule of law places sole responsibility for the injury on the later, direct cause.[14] *Johnson v. Settle*, No. M1999-01237-COA-R3-CV, 2001 WL 585093, *6 fn.3 (Tenn. Ct. App. June 1, 2001) (citing *Fly v. Cannon*, 836 S.W.2d 570, 574 (Tenn. Ct. App. 1992); *Underwood v. Waterslides of Mid-America, Inc*., 823 S.W.2d 171, 180 (Tenn. Ct. App. 1991) (A defendant is not liable if he only furnishes the condition by which the injury is made possible, and there is an intervention of a distinct and unrelated cause of the injury)).

For a decedent's act to constitute an intervening cause: (1) the act must have been sufficient by itself to cause the injury; (2) it must not have been a normal response to the negligent actor's conduct; and (3) the act must not have been reasonably foreseeable to the negligent actor. *Waste Mgmt., Inc.*, 15 S.W.3d at 432. It requires no analysis on our part to acknowledge that being struck

[14] "While the intact survival of this rule after the demise of joint and several liability and the resulting linkage of liability with fault in the aftermath of *McIntyre v. Ballentine*, 833 S.W.2d 52 (Tenn.1992), is questionable, the related concept of intervening cause is undoubtedly still viable." *Johnson*, 2001 WL 585093, *7 fn. 3 (citing *White v. Lawrence*, 975 S.W.2d at 529; *Waste Mgmt., Inc*., 15 S.W.3d at 429-30).

by a motor vehicle was sufficient by itself to cause Cody Downs' injuries and death. It also requires no analysis for us to conclude that running onto the interstate in front of oncoming traffic was not a normal response to the alleged negligent acts of Defendants. That leaves us with but one remaining issue, and that is whether Cody Downs' act was reasonably foreseeable to any of the defendants. *Waste Mgmt., Inc.*, 15 S.W.3d at 432.

No person should be expected "to protect against harms from events that he or she cannot reasonably anticipate or foresee or which are so unlikely to occur that the risk, although recognizable, would commonly be disregarded." *Rains*, 124 S.W.3d at 593 (citing *Ward v. Univ. of the South*, 209 Tenn. 412, 421, 354 S.W.2d 246, 250 (1962); *Tompkins v. Annie's Nannies, Inc*., 59 S.W.3d 669, 673 (Tenn. Ct. App. 2000); *Fly*, 836 S.W.2d at 572; PROSSER & KEETON § 31, at 170). "The test of liability under the law of intervening cause requires a person to anticipate or foresee what usually will happen." *Fly*, 836 S.W.2d at 574. It does not require him to anticipate and provide against what is unusual or unlikely to happen, or that which is remotely possible. *Id*. What is required is that he anticipate and provide against that which is probable according to the usual experience of persons. *Id*.

We have identified two significant opinions wherein the foreseeability of the injured party's act was a central issue concerning the granting or denying of the defense's motion for summary judgment. They are *White v. Lawrence*, 975 S.W.2d 525 (Tenn. 1998) and *Rains v. Bend of the River Shooting Supplies*, 124 S.W.3d 580 (Tenn. Ct. App. 2003). In each case, the defendant was alleged to have negligently caused the deceased's death, and in each case the defense filed a motion for summary judgment contending the fact the deceased committed suicide precluded the plaintiff's recovery. In *White*, the Court concluded the defendant was not entitled to summary judgment as to the plaintiff's claim of negligence; yet, in *Rains* the Court concluded the defendant was entitled to summary judgment. The facts of each case explain the different results, and the reasoning in each is most illuminating.

White v. Lawrence was a medical malpractice case in which the plaintiff, the administratrix of the estate of her deceased husband, Earl White, appealed the summary dismissal of her negligence claim against Dr. William Lawrence. The issue relevant to the case at bar was whether the decedent's suicide was an independent, intervening cause that precluded recovery against the defendant as a matter of law. The *White* Court concluded that the decedent's act of suicide was not an intervening cause of death as a matter of law, but a question of fact to be resolved at trial. *White*, 975 S.W.2d at 532.

The facts pertinent to the denial of summary judgment are that the decedent was addicted to alcohol and suffered from severe depression. He began seeing the defendant, Dr. Lawrence, for a variety of ailments. Dr. Lawrence was aware throughout his treatment that the decedent consumed alcohol to excess and that he was "pretty much" intoxicated whenever he saw him. Dr. Lawrence was also aware that the decedent suffered from "severe depression" because the decedent had told him on two or three occasions he "didn't have any desire to live." *Id.* at 527. Further, Dr. Lawrence admitted knowing the decedent was a "likely candidate" for suicide, for which he repeatedly encouraged the decedent to see a psychiatrist, but without success. *Id*.

In 1993, the decedent's wife discussed with Dr. Lawrence her husband's excessive consumption of alcohol, after which Dr. Lawrence gave her a prescription commonly known as "Antabuse" to discourage her husband from drinking. According to Mrs. White, Dr. Lawrence instructed her to surreptitiously place the medicine in her husband's food, which she did. Soon thereafter, her husband complained of a headache and feeling cold, after which he went alone to the emergency room at a local hospital. The emergency room records indicate her husband "smelled of alcohol," and was under "moderate distress" but was conscious. *Id.* at 527. Since he did not know that he had taken Antabuse, he did not advise the emergency room personnel of that fact. He was diagnosed as suffering from heat exhaustion and discharged. Thereafter, her husband left the hospital only to commit suicide by shooting himself four hours later. *Id.* at 528.

When Dr. Lawrence filed a motion for summary judgment, the plaintiff filed the affidavit of Dr. Kirby Pate, a psychiatrist, in which he opined that Dr. Lawrence's "covert administration of [Antabuse] to an actively drinking person, alcoholic or otherwise, is entirely inappropriate, violates the standard of care, and is dangerous to the point of recklessness." *Id.* Dr. Pate also stated that "[i]t was reasonably foreseeable for Dr. Lawrence to realize that secretly prescribing Antabuse to an alcoholic and depressed patient under his care and control would cause severe physical symptoms, which is a major risk factor for suicide." *Id.* Additionally, Dr. Pate concluded that "[t]he covert prescription and inappropriate instructions for the use of [Antabuse] by Dr. Lawrence in the treatment of Mr. White probably caused [his] suicide death, since Mr. White was suffering from chronic alcoholism and depression. . . ."[15] *Id.*

An expert witness for the plaintiff, Dr. Smith, opined that "the inappropriate prescription and instructions for the use of Antabuse by Dr. Lawrence in the treatment of Mr. White caused the suicide death from depression, occurring as a side effect of the Antabuse." Dr. Smith further testified that Dr. Lawrence owed a duty of care to the decedent not to administer Antabuse without the patient's full knowledge, to warn the decedent of the Antabuse-alcohol reaction, caution him against drinking while taking the drug, and make him fully aware of possible consequences, including the fact that reactions may occur with alcohol up to 14 days after ingesting Antabuse. The defendant did not file any affidavits of experts in response to the affidavits of Drs. Pate and Smith submitted by the plaintiff.

The trial court denied the defendant's motion for summary judgment, finding there were disputed issues of material fact regarding whether the decedent's act of suicide constituted a superseding, intervening cause of death. Following its analysis of the elements of negligence and intervening cause, the Supreme Court opined:

> This Court and the Court of Appeals have held that suicide may constitute an intervening cause if it is a willful, calculated, and deliberate act of one who has the power of choice. However, the act of suicide is not always viewed as an intervening

[15]The plaintiff also submitted the affidavit of Dr. Murray Smith, medical director of the Baptist Hospital Drug and Alcohol Recovery Center in Nashville, who, like Dr. Pate, stated that Dr. Lawrence "should have reasonably foreseen that secretly prescribing and administering Antabuse to an alcoholic and depressed patient would cause severe physical problems and lead to the suicide of the patient." *White*, 975 S.W.2d at 528.

act that relieves the negligent actor from liability.

> As the expert testimony in this case demonstrates, the foreseeability or likelihood of a suicide does not necessarily depend upon the mental capacity of the deceased at the time the suicide was committed. The fact that the deceased was not insane or bereft of reason does not necessarily lead to the conclusion that the suicide, which is the purported intervening cause, is unforeseeable. As our cases dealing with proximate or legal causation have indicated, the crucial inquiry is whether the defendant's negligent conduct led to or made it reasonably foreseeable that the deceased would commit suicide. If so, the suicide is not an independent intervening cause breaking the chain of legal causation. Those decisions holding to the contrary are overruled.
>
> The record in this case shows that reasonable minds could conclude that the decedent's act of suicide was a foreseeable consequence of the defendant's negligence in surreptitiously prescribing and administering the Antabuse. The record shows that leading risk factors for suicide include physical illness and depression. The decedent suffered from both. The plaintiff presented medical proof that the decedent's suicide was reasonably foreseeable from a medical standpoint, and that the defendant's conduct was a substantial factor in bringing about the suicide. Both Dr. Pate and Dr. Smith testified that the defendant should have reasonably foreseen that secretly prescribing Antabuse to an alcoholic and depressed patient would cause severe physical problems and could cause the decedent to choose to end his life. The jury could thus find that the suicide was the foreseeable result of the defendant's negligence.

White, 975 S.W.2d at 529-30 (internal citations omitted). Based upon the foregoing facts, the *White* court denied summary judgment on the factual basis that reasonable minds could differ. *Id.*

Conversely, this Court concluded in *Rains v. Bend of the River Shooting Supplies* that it was appropriate to summarily dismiss the plaintiff's negligence claim. The key to the different conclusions in the two cases is the foreseeability that the decedent might engage in self-destructive acts. *Rains* involved an eighteen year old who committed suicide with his parents' .25 caliber handgun using ammunition he had purchased from a local retailer, Bend of the River Shooting Supplies, hours before his death. *Rains,* 124 S.W.3d at 584.

The parents sued the retailer that had illegally sold ammunition to their son hours before his death. When the trial court denied the defendant's motion for summary judgment, the retailer appealed, and we determined the trial court erred by denying the retailer's Tenn. R. Civ. P. 56 motion because, "based on the undisputed facts, the suicide was not reasonably foreseeable and was the independent, intervening cause of the young man's death." *Id.* at 528.

The facts pertinent to the denial of summary judgment are that the decedent, eighteen-year-old Aaron Rains, was from a close and loving family. He had many friends, attended school regularly, had part-time jobs to earn spending money, and was an active member of the "Police

Explorers." He was also close to his uncle, a deputy sheriff, with whom he frequently rode on patrol. The decedent's father, who owned firearms and taught his son to shoot at a young age, forbade his son to use guns unless he was present to supervise. One of the firearms the father owned was a .25 caliber handgun, which he stored with other weapons in a locked gun case in the home, the key to which was kept in the mother's jewelry box.

One day while his parents were away, the eighteen-year-old decedent found the key to his father's gun case, removed the .25 caliber handgun, and set out to find ammunition.[16] After a failed attempt at a local K-Mart, he drove to the defendant's store, Bend of the River Shooting Supplies, which sold firearms, shooting supplies, and ammunition, where he purchased a box of Winchester .25 caliber cartridges. The store clerk did not ask for proof of age, even though the minimum age to lawfully purchase the ammunition was twenty-one, and sold the ammunition to the decedent. Hours later, the decedent drove his car to Walker Hollow Road, where he loaded the pistol with the ammunition he had purchased at Bend of the River and fatally shot himself.[17] It is undisputed that the decedent used the .25 caliber ammunition he purchased from the defendant to commit suicide. Significant to the matters at issue, there was "no evidence that [the decedent's] conduct and demeanor while he was at Bend of the River were out of the ordinary." *Id*. at 585. It is also undisputed that neither his parents nor any other family members had any warning that he was planning suicide; to the contrary, all outward signs indicated he was a happy, well-adjusted young man. *Id*. at 586.

Following a thorough analysis of relevant law, the *Rains* court reasoned:

> In cases brought against persons who supplied a suicide victim the means to commit suicide, the foreseeability question hinges on the victim's behavior and demeanor at the time of the sale. Abnormal behavior can provide a basis for concluding that the supplier knew or should have known that the decedent was suicidal. We made this point over seventy years ago in an opinion vacating a jury verdict for a fifteen-year-old girl and her parents after the girl attempted suicide with illegally purchased drugs. Even though the pharmacist violated a statute by selling the medication to the girl, the court determined, as a matter of law, that the pharmacist could not have foreseen that she intended to misuse the medication because her "appearance and condition" did not indicate that she was "delirious, hysterical and temporarily crazy." *Eckerd's, Inc. v. McGhee*, 19 Tenn.App. at 287-88, 86 S.W.2d at 576.
>
> More recent cases involving the sale of firearms and ammunition have likewise focused on the conduct and demeanor of the purchaser. The courts generally agree that

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[16]His first attempt to purchase ammunition was the sporting goods department at K-Mart. He inquired about the minimum age for purchasing .25 caliber ammunition and was told he must be at least twenty-one years old, in response to which he commented, "Oh, I'm only eighteen." Rather than purchasing the ammunition, he purchased a package of BBs and left K-Mart.

[17]The Sheriff's Department found a suicide note in the decedent's wallet. The note shed no light on the basis for Mr. Rains' decision to take his own life. *Id*. at 586.

the act of suicide is an independent intervening cause shielding the seller from liability when the purchaser's conduct could not have led the seller, exercising ordinary care, to anticipate or foresee that the purchaser would use the firearm to commit suicide. When the purchaser's conduct and demeanor would not have put the seller on notice that he or she was mentally unstable, the courts hold, as a matter of law, that the purchaser's suicide is an independent, intervening cause that shields the seller from liability for the suicide. *Brashear v. Wal-Mart Stores, Inc.*, 1997 WL 397219, at *2-3 (illegal sale of a handgun to a 19 year old); *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 567 (Iowa 1997) (illegal sale of ammunition to a 20 year old); *Drake v. Wal-Mart, Inc.*, 876 P.2d 738, 741-42 (Okla.Ct.App.1994) (illegal sale of a handgun to a 19 year old). Similarly, the courts have sent cases to the jury when the evidence of the purchaser's conduct or demeanor in the store would permit a trier of fact to conclude that the seller knew or should have known that the purchaser was mentally imbalanced. *Knight v. Wal-Mart Stores, Inc.*, 889 F.Supp. 1532, 1536 (S.D.Ga.1995); *Kalina v. Kmart Corp.*, 1993 WL 307630, at *3.

The conduct of sellers of ammunition should be scrutinized with the same standards used to scrutinize the conduct of sellers of firearms. *Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d at 130. They must be held to foresee that the ammunition will be used. However, with regard to the sale of ammunition to underage buyers, sellers should, in the absence of suspicious conduct or demeanor, be held to foresee only the sorts of misuse or mishandling of ammunition that result from the purchaser's being too young to appreciate the danger of the ammunition. *Cowart v. Kmart Corp.*, 20 S.W.3d at 784. Suicide, because of its inherently self-destructive nature, is not the sort of misuse or mishandling that sellers of ammunition should be required to foresee in the absence of conduct providing the seller with reason to believe that the purchaser might be suicidal.

It is undisputed that Mr. Rains was not a minor; he was over eighteen years old. He was not a stranger to firearms. His father had taught him how to shoot rifles and pistols safely and had laid down strict rules regarding the use of firearms. None of Mr. Rains's family or acquaintances had any suspicion that he was suicidal, and there is no evidence that his conduct or demeanor when he purchased the ammunition should have given the clerk at Bend of the River reason to foresee or anticipate that he intended to use the ammunition to commit suicide or to misuse it in any other way.

In light of these facts, the burden shifted to Mr. Rains's parents to demonstrate the existence of a material factual dispute regarding what the clerk at Bend of the River knew or should have known regarding Mr. Rains's intended use of the ammunition. While Mr. Rains's parents were unable to produce any evidence that their son's demeanor or behavior should have raised concern about his mental stability, they sought to bolster their foreseeability proof with an affidavit by a physician containing statistical information regarding the suicide rate and purportedly demonstrating a correlation between the suicide and firearms. We have determined that this affidavit

> does not create a material factual dispute regarding the foreseeability of Mr. Rains's suicide.

Based upon the above facts, the court found summary dismissal proper. *Rains*, 124 S.W.3d at 594-95.[18]

Although the courts in *White* and *Rains* reached different conclusions, the analysis in each case rested on the foreseeability of the intervening act. The court in *White* found that reasonable minds could conclude that the decedent's intentional act of taking his life was foreseeable, whereas in *Rains*, the Court found that the evidence was such that all reasonable minds would agree that the decedent's act was *not* foreseeable.

The commonality between the aforementioned cases and the matter at hand is the foreseeability of the injured party's intentional act. Thus, this case presents a factual scenario, not unlike suicide, in which the foreseeability of Cody Downs' intentional act is the determining issue of the case.[19]

Similar to the conclusion in *Rains*, we do not believe that any reasonable person would foresee a young man who, upon all accounts was happy and showed no signs of the intention to harm himself, would run into the interstate as the result of being "put" or "assisted" into the bed of the pickup truck. Because "the undisputed facts and inferences to be drawn from the facts enable reasonable persons to draw only one conclusion," it is proper for this court to find the decedent's actions were unforeseeable as a matter of law. *Rains*, 124 S.W.3d at 596 (citing *White*, 975 S.W.2d at 529-30).

Although the issue concerning whether an act constitutes an intervening cause is normally for the jury, the court may rule on the issue if the uncontroverted facts and inferences to be drawn from those facts make it clear that all reasonable persons would agree. *Rains*, 124 S.W.3d at 588 (citing *White*, 975 S.W. 2d at 529-530). The record tells us the decedent, Cody Downs, was a normal, happy, and intelligent eighteen year old, and there is no evidence to indicate that any of the defendants should have foreseen the prospect that he would intentionally engage in activity as reckless as running in front of oncoming traffic. As was the case in *Rains*, none of Cody Downs' family or acquaintances had any suspicion that he was suicidal, and there is no reason to foresee or anticipate that he would expose himself to serious bodily harm via the intentional act of running onto the interstate in front of oncoming traffic.

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[18]The Court found the affidavit of the plaintiff's expert did not comply with Tenn. R. Civ. P. 56.06, because it did not "set forth . . . facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Rains*, 124 S.W.3d at 595.

[19]To be clear, this Court, by analogizing the present matter to cases regarding suicide, is not concluding that Cody Downs committed suicide.

PLAINTIFF'S CLAIM OF OUTRAGE

Plaintiff sets forth an additional claim referred to in the Complaint as "outrage." The tort of outrage, or outrageous conduct, is also known as the intentional or reckless infliction of emotional distress.[20] *See Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). Essentially, Plaintiff contends the deceased was so emotionally distressed that he intentionally ran into traffic on the interstate, thereby committing suicide.

Tennessee recognized the tort of outrageous conduct in *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270, 274 (Tenn. 1966), *see Bain*, 936 S.W.2d at 622, quoting with approval § 46(1) of the RESTATEMENT (SECOND) OF TORTS, which provides as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

There are three essential elements to a cause of action: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury. *Bain*, 936 S.W.2d at 622; *see also Johnson v. Woman's Hospital*, 527 S.W.2d 133, 144 (Tenn. Ct. App. 1975). Liability for severe mental distress clearly "does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities." *Bain*, 936 S.W.2d at 622 (citations omitted). Although no legal standard exists for determining whether particular conduct is "so intolerable as to be tortious," we have applied the high threshold standard described in the RESTATEMENT (SECOND) OF TORTS as follows:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'

Bain, 936 S.W.2d at 622-23, (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965); *see also Goldfarb v. Baker*, 547 S.W.2d 567, 568-69 (Tenn. 1977); *Blair v. Allied Maint. Corp.*, 756

[20] "Outrageous conduct" and "intentional infliction of emotional distress" are not two separate torts. They are simply different names for the same cause of action. *See Moorhead v. J.C. Penney Co., Inc.*, 555 S.W.2d 713, 717 (Tenn. 1977).

S.W.2d 267, 273 (Tenn. Ct. App. 1988) (other citations omitted).

Viewing the facts most favorable to Plaintiff, as we are required to do in a Tenn. R. Civ. P. 56 analysis, we find the proof is deficient because Plaintiff failed to present evidence sufficient to create a material dispute of fact concerning whether: (1) the conduct complained of reaches the level of outrageous conduct, and (2) the deceased suffered serious mental injury.

To constitute outrageous conduct, the conduct must be extreme. The conduct must be so extreme in degree as to go beyond all bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. *Bain*, 936 S.W.2d at 622-23.

To create a material dispute of fact concerning whether the deceased suffered serious mental injury, there must be sufficient evidence that he sustained a mental injury that was serious or severe. *Miller v. Wilbanks*, 8 S.W.3d 607, 614 (Tenn. 1999). The only evidence to support such a contention is that the deceased ran into the interstate traffic. Such evidence is simply deficient to create a dispute of fact whether the deceased sustained a mental injury that was serious or severe.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the plaintiff, appellant.

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FRANK G. CLEMENT, JR., JUDGE